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No. 85-1524

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUBBARD BROADCASTING, INC.,

Petitioner,

vs.

SOUTHERN SATELLITE SYSTEMS, INC., and
TURNER BROADCASTING SYSTEM, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Hubbard Broadcasting, Inc.'s ("Hubbard") statement of the questions that it poses for review mischaracterizes the record below and contains undue argument. Respondents Turner Broadcasting System, Inc. ("Turner") and Southern Satellite Systems, Inc. ("Southern") respectfully submit that, stripped of characterizations and argument, Hubbard's first question is whether the Copyright Act prohibits the practice which permits Turner to address at the same time with different advertisements both its Atlanta viewers and its distant viewers.

Restated, Hubbard's second question is whether the court of appeals erred in ruling that Hubbard had not asserted a claim of direct infringement against Turner before the district court when Hubbard's complaint stated no claim of direct liability against Turner, the thrust of Hubbard's direct liability arguments before the district court was directed entirely at Southern, and Hubbard lacks standing to assert a claim of direct infringement against Turner.

PARTIES TO THIS PROCEEDING AND CORPORATE AFFILIATIONS

Respondent Turner is the parent of MGM Entertainment Company, which is affiliated with United Artists Corporation and MCA, Inc. in the operation of certain joint ventures for the distribution of motion pictures. While Turner has other subsidiaries, they are all wholly owned.

Southern is a wholly-owned subsidiary of TEMPO Enterprises, Inc., and is an affiliate of the other subsidiaries of TEMPO Enterprises, Inc., which are TEMPO Television, Inc.; TEMPO Cable, Inc.; TEMPO Productions, Inc.; TEMPO Sound, Inc.; Satellite Television Systems, Inc.; Stigler Cable Television, Inc.; The Music Group, Inc.; WCGA-AM, Inc.; Ponca City Broadcasting, Inc.; and Reno Entertainment Television, Inc. Southern is also an affiliate of various joint ventures and partnerships in which TEMPO Enterprises, Inc. owns a controlling interest, either directly or indirectly. These are: Satellite Television Systems, Tulsa TV 41, Tulsa TV Leasing, Ann Arbor STV Limited Partnership, and Music in the Air.

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OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondents Turner and Southern adopt Petitioner Hubbard's statement of Opinions Below, Jurisdiction, and Statutory Provisions Involved.

COUNTERSTATEMENT OF THE CASE

I. The Operations of Turner's Broadcast Station WTBS and Southern.

The following description of the operations of WTBS and Southern is taken from the stipulated record below.[1]

WTBS is one of three television stations, generally known as "superstations," whose copyrighted programming is retransmitted by satellite carrier, such as Southern, to cable systems outside the stations' local service areas. The superstations receive no license fee from either the carriers or the cable systems. The programming of WTBS is broadcast free over the air in its local service area. Outside that area cable systems pay Southern a transmission fee to cover delivery of that programming, and those cable systems pay a royalty fee to the Copyright Royalty Tribunal for their compulsory copyright license to retransmit that programming pursuant to § 111 of the Copyright Act, 17 U.S.C. § 111. WTBS is thus

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[1] Following the submission of cross motions for summary judgment, the parties advised the district court that it should resolve any factual questions found to exist on the basis of the record then before the court. Thus, the parties in effect submitted the case for trial on a stipulated record. Joint Appendix filed by the parties before the Eighth Circuit (hereinafter "App.") at 509-10.

unlike cable networks, such as Home Box Office or Turner's affiliate Cable News Network, which do not broadcast to the public at large and which impose a fee for their programming.

Initially, Southern received WTBS's programming off the air at its "earth station," which retransmits that programming to a communications satellite from which it is relayed to cable systems.[2] Southern received complaints that the technical quality of the retransmitted WTBS picture was inferior to that of other satellite-transmitted program services. App. 465-66. The quality and reliability of the WTBS picture, Southern realized, could be improved by the establishment of a direct interconnection between WTBS and Southern. In April of 1979 Southern installed, and since that time has operated, a direct interconnection with WTBS. WTBS delivers its signal to Southern by means of a cable directly from its studios to a microwave transmitter owned and operated by Southern. Southern then microwaves that signal to its earth station. App. 465-70. As a result, since April 1979 Southern has been able to receive WTBS in two ways: off-the-air and by direct microwave transmission.

Southern retransmits the signal received from WTBS by the microwave relay so long as that signal is available. App. at 448. If the microwave signal is lost for any reason or is interrupted by WTBS, an

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[2] Southern commenced satellite delivery of WTBS on December 15, 1976. Prior to its delivery by Southern, WTBS had been transmitted by terrestrial microwave carriers to cable systems with approximately 400,000 subscribers. App. at 454. Today WTBS is available to approximately 36 million viewers outside of the Atlanta area.

automatic switching device known as a video presence detector located at Southern's earth station switches to the off-the-air signal to prevent interruption of Southern's retransmission of WTBS. Whichever signal emerges from the video presence detector is then retransmitted in its entirety via satellite by Southern without any editing or selection of content. App. at 448, 465.

For independent business reasons, Turner also desired the direct interconnection between WTBS and Southern to be implemented. While interested in signal quality, Turner wished to profit, if possible, from the distant viewing of its programming made possible by the retransmission of that programming by cable systems. Atlanta businesses were unwilling to pay higher advertising rates based upon WTBS's distant audience because they obtained no benefit from that audience. Some national companies were reluctant to advertise on WTBS because advertisements containing information relevant only in the Atlanta area would be seen in other locales where that company also did business but where the information would not be correct. Turner, therefore, wanted the ability to insert national commercials in the signal sent to Southern in the same time slot where commercials of local interest only were aired in Atlanta. App. at 467. The direct transmission to Southern gives WTBS the capacity to do so. The copyrighted program material is the same in either case.

II. The Nature of Hubbard's Interest.

Hubbard has obtained licenses from the copyright owners of five audiovisual works ("the Works") authorizing one of its three television stations to telecast that Work. Those licenses prohibit the copyright own-

ers from direct licensing of the Works to cable systems or other television stations in the local market areas of Hubbard's licensed stations. App. 427-36 These limited exclusivity provisions are the basis for Hubbard's suit. Hubbard's licenses do not, as they cannot, prevent carrier and cable system retransmission of the Works in Hubbard's markets pursuant to the compulsory copyright provisions of § 111 of the Copyright Act.

Turner is also licensed to telecast the Works, and Southern has retransmitted Turner's primary transmissions of the Works and the accompanying advertisements designed for a national audience to cable systems in Hubbard's markets. Hubbard does not object to the retransmission of the Works themselves, but rather its petition is based solely upon Turner's practice of addressing the Atlanta and the national markets with different commercial materials at the same time, which practice it refers to as commercial substitution. It has not proved that any injury has occurred because of Turner's practice, either to itself or any broader interest.

SUMMARY OF ARGUMENT

Hubbard has presented no federal question of public significance. The decision of the Eighth Circuit is in total harmony with those of the other circuits which have dealt with satellite common carriers as well as those of this Court. Both the direct transmission from Turner to Southern and Turner's addressing distant markets with commercials different from those viewed by its Atlanta audience are consistent with the provisions and purposes of § 111 of the Copyright Act. No copyright owners have sued objecting to Turner's

treatment of commercials. Only Hubbard, a local broadcaster holding limited copyright licenses and which has shown no damage resulting to it from that practice, has sued. The industry-wide injury which Hubbard infers will result from the Eighth Circuit's decision does not exist. In short, the questions posed by Hubbard are not entitled to review by this Court.

REASONS FOR DENYING THE WRIT

I. No Conflict Exists Among The Circuits.

An essential part of the compulsory licensing system established in § 111 is the exemption from liability for copyright infringement granted by § 111(a)(3) to common carriers that retransmit the primary transmissions of broadcast stations to cable systems. Hubbard contends that the Eighth Circuit's holding that Southern meets the requirements for that exemption conflicts with the analyses of those requirements made by the Seventh Circuit in *WGN Continental Broadcasting v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982) ("*WGN*") and by the Second Circuit in *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("*Eastern Microwave*").

Hubbard is forced to concede (Petition page 11) that no conflict exists among the holdings of the circuit courts. Hubbard asserts that the holding below conflicts with the "reasoning" of the other circuits, but fails to show how this is so.

In *WGN*, the carrier exceeded the limits of the exemption when it deleted a portion of the copyrighted material contained in the signal it received from the broadcast station and then retransmitted.

That deletion violated the requirement of § 111(a)(3) that the carrier act only as a passive intermediary between the primary transmitter and the cable systems in order to qualify for the carrier exemption. 693 F.2d at 625-28. Southern does not alter in any way the signal that it receives from WTBS and then retransmits. Regardless of whether it retransmits the transmission received off the air or that received from WTBS by direct interconnection, Southern retransmits the television signal that it receives from WTBS in its entirety without deletion or alteration.

In *Eastern Microwave*, the Second Circuit concluded that the carrier qualified for the exemption because it retransmitted exactly what it received and the entirety of what it received. 691 F.2d at 130-32. Southern's retransmission of WTBS differs from that of the carrier in *Eastern Microwave* only in that Southern receives WTBS by direct interconnection as well as off-the-air. Like the *Eastern Microwave* carrier, Southern exercises no control over the content of the signal retransmitted but only retransmits exactly what and all of what it receives. Indeed, the Eighth Circuit expressly adopted the reasoning of the Second Circuit in reaching its holding that Southern qualified for the exemption.

Nothing in *WGN* or *Eastern Microwave* suggests that Turner's manner of dealing with commercials should affect the determination whether Southern qualifies for the exemption. Turner, not Southern, decides what commercials Southern receives. Hubbard has no copyright interest in the commercials transmitted by Turner, and with respect to the Works, the content of the signal retransmitted by Southern was the same regardless of whether it retransmitted the

over-the-air signal or the signal received by direct interconnection. Thus, the Eighth Circuit has not interpreted the passivity requirement of the common carrier exemption differently from the Second Circuit in *Eastern Microwave* or the Seventh Circuit in *WGN*. All three courts have focused upon the extent to which the carrier has exercised control over the content of the retransmission. Where, as here, the carrier simply retransmits the transmission embodying the copyrighted work without alteration, the reasoning of the Second Circuit and the Seventh Circuit warrants the conclusion reached by the Eighth Circuit that Southern qualifies for the exemption.

II. The Reasoning Of The Eighth Circuit Is Consistent With Prior Decisions Of This Court.

Hubbard asserts that the Eighth Circuit has created an exemption from copyright liability for "participants in copyright infringement which have a 'legitimate business interest' in facilitating the infringement." Petition at 15-16. By so doing, the Eighth Circuit has, Hubbard contends, deviated from prior decisions of this Court. Hubbard mischaracterizes the reasoning of the Court below.

Hubbard's argument unfairly assumes that Southern and Turner have infringed its copyright rights. Once that unfounded assumption is removed, Hubbard's discussion of this Court's prior decisions addressing the issue of contributory infringement becomes meaningless. The court below addressed the question of whether infringement occurred, not the conditions under which the principles of contributory infringement might apply. Specifically, in the section of its opinion referenced by Hubbard, the court was addressing Hubbard's argument that Southern exer-

cised control over the selection of the primary transmission through its retransmission of the signal received from Turner by direct interconnection rather than off the air. The court did not create any new exemption from copyright liability but simply concluded that Southern's use of a means of signal delivery resulting in better signal quality did not constitute the type of control over the content or selection of the primary transmission made impermissible by § 111(a)(3) and therefore did not cause it to lose the carrier exemption.

Moreover, the recognition by the Court below that the provisions of the Copyright Act must be applied cautiously to new technologies not in existence at the time of its enactment comports with this Court's reasoning in *Sony Corporation of America v. Universal City Studios, Inc.* 464 U.S. 417, ___, 104 S.Ct. 774, 788 (1984) and *Capital Cities Cable, Inc. v. Crisp*, ___ U.S. ___, ___, 104 S.Ct. 2694, 2705-2706 (1984).

III. The Eighth Circuit's Decision Is Consistent With The Intent Of Section 111.

Hubbard's argument is that the Eighth Circuit Decision contravenes congressional intent by allowing a local broadcaster whose programming is retransmitted to distant markets to charge advertisers for that distant audience. That argument finds no support in the Copyright Act or its legislative history.

The Copyright Act does prohibit deletion or substitution of commercials by cable systems in § 111(c)(3). The purpose of this prohibition is to prevent a cable system from competing with the local broadcaster for local advertising dollars to sponsor programming for which the cable system pays only a

nominal fee. H. R. Rep. No. 94-1476, 94th Cong., 2d Sess. 1, at 93-94, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5708. This rationale has no application to a primary transmitter such as Turner, which does not compete with local broadcasters for advertising and which must negotiate with copyright owners for licenses to the copyrighted works its broadcasts.[3]

Turner's procedure with commercials causes no harm to local broadcasters such as Hubbard. WTBS seeks to address the national market and the Atlanta market. It cannot separately address Hubbard's markets and therefore cannot compete for advertisers who wish to reach only those markets. Those advertisers must go to Hubbard or its competitors in those markets. Similarly, an advertiser desiring to reach a national audience would have no reason to weigh buying commercial time from Hubbard against buying time from WTBS.

Hubbard also sees the Turner procedure as a threat to copyright owners. Significantly, however, no copyright owners have sued Turner or Southern because of the practice. The reason is that they suffer no harm because Turner's ability to address the Atlanta and

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[3] Rather than conflicting with congressional intent, WTBS's practice alleviates a separate Congressional concern that copyright owners would not be able to demand higher licensing fees from broadcast stations carried in distant markets because advertisers would not pay higher rates for viewers outside the station's local area. As the D.C. Circuit concluded in *National Cable Television Assoc. v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1079-80 (1982), it was this concern that prompted Congress to require cable operators to pay royalties based upon the distant signals they carried.

the national markets with different commercials enables it to charge advertisers for either the Atlanta market, the national market, or both, as the advertiser desires, thus enhancing Turner's revenues and enabling Turner to pay the increased fees demanded by the copyright owners because of its national audience. App. at 475-77.

Further, while this case is of profound importance to the parties, it presents no issue of importance to the public. Even if Hubbard were to get everything it asks for, the effect would merely be to require Turner to show the same commercial to both the Atlanta and the national markets. Since the overwhelming majority of Turner's revenue comes from national commercials, Turner would show those commercials whenever possible. Thus, while Turner's Atlanta viewers would see fewer local commercials, viewers of WTBS in the rest of the country would see the same commercial mix as they see now. In that event, Southern's activities would be exactly the same as they are now. Moreover, Hubbard would not be affected. Most importantly, there would be no effect at all on the cable television industry. The only effect is that Turner would lose some of its revenues. A case which presents no issue of immediate public significance is not worthy of review by this Court. All of Hubbard's contentions were carefully analyzed and fairly resolved by the Eighth Circuit, and do not merit further review.

IV. The Issue Of Turner's Liability For Direct Infringement Of Hubbard's Copyright Interests Does Not Merit Consideration By This Court And Was Correctly Decided By The Court Below.

In the last section of its petition, Hubbard asks the Court to review the Eighth Circuit's ruling that Hubbard had not raised before the district court any issue of Turner's liability for direct infringement of Hubbard's copyright rights. That question, which will turn solely on the procedural history of this proceeding, does not involve any conflict in decisions from different circuit courts, does not raise any question of importance concerning the interpretation of the Copyright Act or prior decisions of this Court, and affects no one other than the parties to this action. Even if the ruling below were incorrect, and Turner and Southern contend that it clearly is not, that decision would not constitute any gross miscarriage of justice, would not result in an erosion of a statutory or legal principle, and would have no unduly harsh impact. Therefore, that ruling does not merit review by this Court.

As to the merits of Hubbard's argument that Turner has directly infringed its copyright rights, in its complaint, which it amended on three occasions, the only claims asserted by Hubbard against Turner were entitled "contributory copyright infringement" (Count VII), "vicarious copyright infringement" (Count VIII), and "conspiracy to infringe copyright" (Count IX). App. at 36-39. Each of these counts alleges that Turner is secondarily liable for the alleged infringing activities of Southern. Hubbard did not allege any theory of direct liability by Turner in its complaint. While a few statements made by Hubbard in its vo-

luminous briefs to the district court could, if taken out of context and viewed in isolation, be interpreted to suggest a claim of direct infringement by Turner, the thrust of Hubbard's direct liability arguments before the district court was directed entirely at Southern. Neither the district court nor the Respondents understood that Hubbard was asserting a claim of direct liability against Turner, and the Respondents made no effort to address such a claim in their arguments before the district court.

Had Hubbard raised a claim of direct infringement against Turner before the district court, the Respondents could have easily refuted it. Under the Act, Hubbard may bring an action for infringement only with respect to the *particular right* held by it. 17 U.S.C. § 501. Hubbard's licenses to the Works grant it exclusivity only against cable systems and television stations located in the market areas of Hubbard's stations. App. at 427-36. Turner is neither. Hubbard therefore has no standing to assert a claim of direct infringement against Turner.

CONCLUSION

For the reasons stated hereinabove, Hubbard's petition should be denied.

Respectfully submitted,

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